Filed 5/3/10 P. v. Masotti CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Modoc)

THE PEOPLE, Plaintiff and Respondent, v. RICHARD MASOTTI, Defendant and Appellant.	C061772 (Super. Ct. No. F06463)

An information accused defendant Richard Masotti of possession of Vicodin without a prescription (Health & Saf. Code, § 11350, subd. (a)),[1] cultivation of marijuana (§ 11358), and two counts of sale of marijuana (§ 11360, subd. (a)). The trial court dismissed the Vicodin count. A jury convicted defendant of cultivation and two counts of the lesser included offense of furnishing marijuana (§ 11360, subd. (b)).

[1] Further undesignated statutory references are to the Health and Safety Code.

Defendant was sentenced to 120 days of incarceration with credit for five days and fined an aggregate $1,660.[2]

On appeal, defendant contends his cultivation conviction must be reversed because (1) the trial court's instructions, together with the prosecutor's opening and closing summations, materially misled the jury on his Compassionate Use Act (CUA; § 11362.5) defense, (2) he established his CUA defense as a matter of law, (3) the jury was erroneously instructed on the elements of the offense, and (4) the jury was not instructed on the prosecution's burden to prove that he cultivated marijuana for some purpose other than personal medical use. We shall affirm the judgment.

FACTS FROM PRIOR OPINION

"Defendant is a Vietnam War veteran who suffers from pain in his knees and hip. He has used marijuana for pain management. In April 2006, he obtained a medical marijuana recommendation

---

[2] Pursuant to this court's Miscellaneous Order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence credits. (Ct. App., Third App. Dist., Misc. Order No. 2010-002.) As expressed in the recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354, we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excepted from the additional accrual of credit. (§ 4019, subds. (b)(2) & (c)(2); Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50.) Consequently, defendant having served five days of presentence custody, is entitled to four days of conduct credit.

card. After receiving the card, he began growing marijuana at home.

"In October 2006, California Highway Patrol Officer William Brian Cox arranged for an informant, Perry E., to make a 'controlled buy' from defendant. Perry E. went to defendant's home and asked for marijuana, telling defendant it was his birthday. Defendant gave Perry E. the marijuana, but refused payment. Perry E. placed $10 on the table before he left.

"In November 2006, Officer Cox had Perry E. perform another 'controlled buy' from defendant. Defendant again gave Perry E. marijuana. Perry E. gave defendant $5.

"On November 17, 2006, officers searched defendant's residence. During the search, the officers found marijuana plants, drying marijuana, and dried marijuana. The officers also found $189 in cash. Officer Cox testified the amount of marijuana recovered was within state guidelines for someone with a medical marijuana card." (*People v. Masotti* (2008) 163 Cal.App.4th 504, 506.)

DISCUSSION

I.

Defendant contends his cultivation conviction must be reversed because "the jury instructions for the CUA, when combined with the prosecutor's closing argument, resulted in the jury being materially misled" into "believing that his

furnishing of marijuana automatically forfeited his CUA defense."[3] The contention has no merit.

Background

The trial court instructed the jury on the CUA with a modified version of CALCRIM No. 2370 as follows: "The possession or cultivation of marijuana is not unlawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes or as a primarily [*sic*] caregiver of a patient with a medical need when a physician has recommended or approved such use. The amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find that the defendant is not guilty of this charge."[4]

---

[3] Defendant concedes that his trial counsel did not object to the jury instructions at issue in this appeal. He claims the instructions were erroneous and prejudicial, thus affecting his substantial rights. (Pen. Code, § 1259.) The Attorney General counters that defendant forfeited his claims when he failed to seek clarification or amplification of otherwise correct instructions. (*People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Because the forfeiture argument depends upon the instructions' correctness, we simply consider that issue on its merits.

[4] The pattern version of CALCRIM No. 2370 provides in relevant part: "Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act

At the request of the prosecutor, the trial court further instructed the jury: "The Compassionate Use Act provides for the legal use of marijuana for medical reasons. This applies only to possession and cultivation of marijuana. It does not allow sale or furnishing marijuana to others by a person who is covered by the act."

The prosecutor argued to the jury that defendant had admitted the lesser offense of furnishing marijuana. "I said if you have got a 215 card [i.e., a physician's recommendation], aren't you supposed to use that only for medical purposes? He said, yes. And I says, do you give marijuana to people, smoke with them? Yes, I do. I said: What does that mean? He said, well, I guess I violated my 215 card. Ladies and gentlemen, we are really here because of the abuse of a 215 card caused by sales, not necessarily by him smoking and using, smoking with some of his friends."

Later, the prosecutor argued: "Medical marijuana is a defense in this case. If you take away sales in this case, the amount of marijuana that the man had in his house at the time would probably have been the recommendation and the guidelines. I'm not going to quarrel with that. But this is a case where

---

to apply, the defense must produce evidence tending to show that his possession or cultivation of marijuana was for personal medical purposes with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. If you have a reasonable doubt about whether the defendant's possession or cultivation of marijuana was unlawful under the Compassionate Use Act, you must find the defendant not guilty."

someone with a 215 card is selling marijuana. That's the reason why this case is so damned important. This is an important case. We have lots of marijuana cards out in this county and in this state, in this country. We don't want the Dick Masotti[]s to be using their marijuana to sell marijuana to the Perry [E.'s] or to your kid or to anyone else; utilizing their marijuana card to make it legal to grow some while they sell it and then grow some more. That's the purpose of this trial."

Defense counsel conceded that defendant had furnished marijuana and argued that his "transfer of relatively minor amounts of marijuana" was not a sale. He argued, "[m]y client has a history of being probably overly generous with his--what we might think of as his friends. He shares what little marijuana he has with them when it's available. That's furnishing. That's not sales."

In his closing summation, the prosecutor quoted the jury instruction that "[t]he Compassionate Use Act provides for the legal use of marijuana for medical reasons. This applies only to possession and cultivation of marijuana. It does not allow sale or furnishing marijuana to others by a person who is covered by this act. Pretty clear."

The trial court failed to read to the jury the elements of cultivation: (1) defendant cultivated one or more marijuana plants, and (2) defendant knew the cultivated substance was marijuana. These elements were contained in the written instructions supplied to the jury. The jury convicted defendant

of cultivation of marijuana and two counts of furnishing marijuana.

Analysis

Defendant claims ambiguities in the jury instructions, together with the prosecutor's opening and closing summations, misled the jury into believing that his furnishing of marijuana automatically forfeited his CUA defense. We disagree.

This court has explained that the Compassionate Use Act "authorizes the cultivation and possession of marijuana only 'for the personal medical purposes of the patient.' (Health & Saf. Code, § 11362.5, subd. (d).) If a person cultivates or possesses marijuana for any other purpose, the defense is not available. (See *People v. Mower* [(2002)] 28 Cal.4th [457], 484–485 [jury question whether defendant possessed and cultivated 31 marijuana plants entirely for his own personal medical purposes].)" (*People v. Jones* (2003) 112 Cal.App.4th 341, 346, fn. 2; see *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 769, 772-773.)

Defendant claims his defense tendered the "jury question" to which *Jones* alluded in its synopsis of *Mower*: "whether [he] . . . cultivated . . . marijuana plants entirely for his own personal medical purposes." (*People v. Jones, supra*, 112 Cal.App.4th at p. 346, fn. 2; see *People v. Mower, supra*, 28 Cal.4th at pp. 484-485.) Defendant reasons that, *so long as his sole intent during the cultivation process was to meet his own medical purposes*, his later furnishing of the mature crop to another person would not exclude him from the CUA defense, as

would his *intent during the cultivation process to sell or furnish the mature product to another*.

Defendant claims the jury instructions erroneously failed to tender this factual question. We disagree.

The modified version of CALCRIM No. 2370 stated: "The People have the burden of proving beyond a reasonable doubt that the defendant *was not authorized* to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find that the defendant is not guilty of this charge." (Italics added.)

The instruction made plain that the CUA *authorizes* "a person to . . . *cultivate marijuana for personal medical purposes*." (Italics added.) Because defendant had obtained the requisite physician approval, the People could show that the cultivation "was not authorized" by the CUA only by proving that the cultivation *had not been intended* "for personal medical purposes." It would not suffice to prove merely that a cultivation *intended* for personal medical purposes *was later furnished or sold*. Had the prosecution not made the requisite showing, the jury would have been required to acquit defendant of cultivation. We consider the trial evidence indicative of defendant's intent in part II, *post*.

The prosecutor's special instruction did not compel a different conclusion. That instruction stated: "The Compassionate Use Act provides for the legal use of marijuana for medical reasons. This applies only to possession and

cultivation of marijuana. It does not allow sale or furnishing marijuana to others by a person who is covered by th[e] act."

The obvious purpose of this instruction was to limit the CUA defense to the cultivation count and to preclude its application to the sales/furnishing counts. Defendant claims the instruction "was wrong because [his] selling or furnishing of marijuana did not deprive him of the defense to cultivation provided by the CUA if [he] cultivated the marijuana for a personal medical purpose." However, the instruction did not state or imply that sale or furnishing would adversely affect his CUA defense *to the cultivation count*. Rather, it simply meant that the CUA did not provide a defense *to the sales/furnishing counts*. No error is shown.

The prosecutor's opening summation did not suggest that defendant could be convicted of cultivating marijuana for his personal medical use if, as an afterthought, he furnished that marijuana to another. Thus, the argument did not contradict CALCRIM No. 2370's requirement that the prosecutor must prove that the cultivation was not authorized by the CUA.

Contrary to defendant's claim, the prosecutor's argument that "this is a case where someone with a 215 card is selling marijuana" did not suggest that the mere fact of sales negated his CUA defense to the cultivation count. Rather, his argument, "[w]e don't want the Dick Masotti[]s to be using their marijuana to sell marijuana to the Perry [E.'s] or to your kid or to anyone else; utilizing their marijuana card to make it legal to grow some while they sell it and then grow some more" suggested

that defendant *intended* to engage in an ongoing process of cultivation and distribution to others, which plainly would fall outside the CUA. (See part II, *post*.)

In sum, neither the jury instructions nor the prosecutor's argument "prevented the jury from making the factual determination of whether [defendant] cultivated the marijuana for a personal medical purpose." There was no Sixth Amendment or due process violation.[5]

II.

Defendant contends his cultivation conviction must be reversed because the CUA defense was established as a matter of law. In his view, "[t]he evidence was insufficient to demonstrate that [he] cultivated marijuana for a non-medical purpose." We disagree.

"On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citations.] Evidence meeting this standard satisfies constitutional due process and reliability concerns. [Citations.] [¶] While the appellate court must determine that the supporting evidence is

---

[5] Defendant's argument rests in part on the state guidelines in the Medical Marijuana Program Act, section 11362.77. He claims his possession of a quantity of marijuana within the guidelines suggests that he did not lose his defense to cultivation under the CUA. The argument survives *People v. Kelly* (2010) 47 Cal.4th 1008, which holds that the guidelines cannot constitutionally burden a CUA defense. (*Id.* at p. 1048.)

reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the prosecution, and must presume every fact the jury could reasonably have deduced from the evidence. [Citations.] Issues of witness credibility are for the jury. [Citations.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480.)

In a prior appeal,[6] in the unpublished portion of the opinion, this court determined: "Here, the jury could have reasonably inferred the defendant's cultivation was, at least in part, for purposes *other than* defendant's medical use. The evidence showed that defendant had previously pled guilty to growing marijuana, that he had previously given marijuana to Perry E., and that [Perry E.] had purchased marijuana from defendant on previous occasions. Furthermore, the jury found defendant guilty of illegally furnishing marijuana to Perry E. Taken together, these facts could allow a reasonable jury to find that defendant did not cultivate the marijuana solely for medical reasons, but also for the purpose of furnishing it to others." (*People v. Masotti*, *supra*, slip opn. at pp. 9-10.)

"Under the doctrine of the law of the case, a principle or rule that a reviewing court states in an opinion and that is necessary to the reviewing court's decision must be applied throughout all later proceedings in the same case, both in the

---

[6] The trial court granted defendant's motion for a new trial on the cultivation count. In an appeal by the People, this court reversed the new trial order and remanded the matter for sentencing. (*People v. Masotti*, *supra*, 163 Cal.App.4th 504, 508-509.)

trial court and on a later appeal. [Citations.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 94.) "We will apply the law of the case doctrine where the point of law involved was necessary to the prior decision and was '"actually presented and determined by the court."' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 197.)

Applying the doctrine of law of the case, we adhere to our prior holding that the record supports a reasonable inference that defendant did not cultivate the marijuana solely for his personal medical reasons, but did so in part for the purpose of furnishing it to others. Were we to consider the foregoing facts anew, we would conclude that they support this inference.

Because the inference constitutes substantial evidence that defendant did not cultivate the marijuana solely for medical reasons, we reject his contention that the CUA defense was established as a matter of law.

III.

Defendant contends his cultivation conviction must be reversed because the trial court failed to instruct the jury on the elements of cultivation of marijuana. As noted, the elements of cultivation were set forth in the written instructions, but the trial court did not read the elements aloud to the jury. (See part I, *ante*.)

The Attorney General concedes that the failure to read the instruction aloud was error but argues that it was harmless given that defendant admitted cultivating marijuana. We agree.

Background

The trial court evidently got sidetracked during a bench conference while reading the jury instructions and inadvertently failed to read to the jury the elements of cultivation of marijuana. As noted, the elements of cultivation listed in the written instruction are: (1) defendant cultivated one or more marijuana plants, and (2) defendant knew the cultivated substance was marijuana.

Copies of the jury instructions, which included the elements of cultivation, were made available to the jury during deliberations. Defense counsel urged the jurors to read the cultivation instruction.

Defendant testified that he used marijuana "on and off" since 1969 and 1970, and that he started growing it after he obtained the medical marijuana recommendation in 2006. He had tried to grow it before, "but it never worked out." Defendant testified that the quality of the marijuana he grew was "probably a two on a ten scale." Other people "want good pot," so he did not sell his crop, which had "hardly any value at all." Defendant had been placed on diversion for possession of marijuana in 1974 and for cultivation of marijuana in 1979.

Analysis

The trial court's error consists of its failure to read aloud from the written instruction on cultivation of marijuana. Defendant claims this error is reversible per se, citing *People v. Cummings* (1993) 4 Cal.4th 1233, for the proposition that harmless error analysis may not be applied "to instructional

error which withdraws from jury consideration substantially all of the elements of an offense and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had been proved." (*Id.* at p. 1315.)

Contrary to defendant's argument, the failure to read the cultivation instruction aloud did not "withdraw" the elements of cultivation from jury consideration. Only the jury's failure to examine the written instruction could have done that. We can only speculate whether the jurors read the written cultivation instruction during their approximately 40 minutes of deliberations. This is not the affirmative showing of prejudicial error that is required to overcome the presumption that the trial court's judgment is correct. (*People v. Brown* (1988) 204 Cal.App.3d 1444, 1451.)

In any event, the jury could not convict defendant on the furnishing counts without finding that he *knew that the product he had grown and furnished was a controlled substance*. He claimed to have sufficient knowledge to distinguish between relatively high and low quality marijuana, and there was no evidence or argument that he had believed the furnished substance to have been anything other than marijuana. Thus, the verdict on the furnishing counts effectively resolved the knowledge element of the cultivation count adversely to defendant. (*People v. Cummings, supra,* 4 Cal.4th at p. 1315.)

The remaining element of the crime is the act of cultivation. "One situation in which instructional error

removing an element of the crime from the jury's consideration has been deemed harmless is where the defendant concedes or admits that element. [Citations.]" (*People v. Flood* (1998) 18 Cal.4th 470, 504.) Defendant conceded in his testimony that he had cultivated marijuana. No juror who disbelieved the concession would have convicted him anyway in the mistaken belief that a cultivation conviction requires no act of cultivation. Beyond a reasonable doubt, the failure to read aloud the cultivation element located in the jury instruction sent in to the jury did not contribute to the jury's verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]; *People v. Flood*, *supra*, at p. 504.)

IV.

Defendant contends his cultivation conviction must be reversed because the jury instructions failed to state that the prosecution had the burden to prove beyond a reasonable doubt that he cultivated the marijuana for "some purpose other than his own personal medical use." The point has no merit.

As we noted in part I, *ante*, the modified version of CALCRIM No. 2370 provided: "The People have the burden of proving beyond a reasonable doubt that the defendant *was not authorized* to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find that the defendant is not guilty of this charge." (Italics added.)

The instruction made plain that the CUA *authorizes* "a person to . . . *cultivate marijuana for personal medical*

purposes."[7] (Italics added.) Thus, to show that the cultivation "was not authorized" by the CUA, the People were required to prove beyond a reasonable doubt that the cultivation *had not been intended* "for personal medical purposes." Thus, the instruction effectively required the prosecution to prove beyond a reasonable doubt that defendant cultivated the marijuana for "some purpose other than his own personal medical use." There was no error.

The jury was instructed: "Every crime charged in this case requires proof of the union or joint operation of act and wrongful intent. In order to be guilty of any of the crimes charged a person must not only commit the prohibited act, but must do so intentionally or on purpose. The act required is explained in the instructions for each crime. However it is not required that he or she intended to break the law."

Defendant claims this instruction somehow told the jury that the CUA defense did not apply if he intended simply to cultivate marijuana, rather than to cultivate it with the specific intent to use it for a nonmedical purpose. (CALCRIM No. 250.) We frankly doubt that any reasonable juror could have divined that meaning from this instruction.

---

[7] Defendant claims it "was undisputed that [he] was authorized to possess and cultivate marijuana for a medical purpose" and that his "authorization to possess marijuana in this case was not in issue." However, as the first sentence of CALCRIM No. 2370 makes plain, the word "authorized" refers to the *statutory* authorization in the CUA, not to a physician's "authorization" to use marijuana to treat a particular illness.

But if any juror did, there was no error. As noted, the CUA applies where marijuana is grown *with* the intent to use it for a personal medical purpose. Absent such intent, the CUA defense would not apply. There was no error.

DISPOSITION

The judgment is affirmed. The trial court is directed to reflect defendant's five days of actual custody and four days of conduct credit, and to prepare an amended minute order to reflect the correct award of credits.

CANTIL-SAKAUYE, J.

We concur:

NICHOLSON, Acting P. J.

RAYE, J.